Supreme Court, U.S.
FILED

94 432 SEP - 9 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

H. SCOTT BUSCHMAN,
Petitioner,

vs.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT E. SUTTON
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

Attorney for Petitioner

29pp

QUESTIONS PRESENTED

1. Should a presumption of purposeful racial discriminatory use of peremptory challenges arise when multiple strikes are exercised against minority members of the venire?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I.

WHERE A PARTY EXERCISES MULTIPLE PEREMPTORY STRIKES AGAINST MINORITY MEMBERS OF THE JURY PANEL A REBUTTABLE PRESUMPTION OF DISCRIMINATORY MOTIVE SHOULD ARISE NOT SATISFIED MERELY BY "RACE NEUTRAL" REASONS ADVANCED BY COUNSEL 3

CONCLUSION 17

APPENDIX ..... A-1 to A-8

TABLE OF AUTHORITIES

Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 109 S.Ct. 1712 (1986) 4

Edmondson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991) 4

Hernandez v. New York, 111 S.Ct. 1859 (1991) 4

Soler v. McHenry, 771 F.Supp. 252 (N.D. Ill. 1991), 989 F.2d 253 (7th Cir. 1993) 5

Splunge v. Clark, 960 F.2d 705 (7th Cir. 1992) 5

State v. Lopez, 173 Wis.2d 724, 496 N.W.2d 617 (Ct. App. 1992) 4

No. _____

In The

Supreme Court of the United States

October Term 1994

H. SCOTT BUSCHMAN,
Petitioner,

vs.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

The petitioner, H. Scott Buschman, respectfully prays that a writ of certiorari issue to review the decision of the Wisconsin Court of Appeals District I dated April 5, 1994 and the denial of the Petition of Review thereof by the Wisconsin Supreme Court dated June 14, 1994.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court dated June 14, 1994 ordering that the petition for review is denied is reprinted at pp.A-1 of the Appendix to this Petition. The Opinion of the Wisconsin Court of Appeals, District I, dated April 5, 1994 is reprinted at pp. A-2 to A-8 of the Appendix to this Petition.

JURISDICTION

The Wisconsin Supreme Court on June 14, 1994 issued its order denying the Petition for Review and thereby affirming the decision of the Wisconsin Court of Appeals District I entered on April 5, 1994. The jurisdiction of this Court to review the decision of the Wisconsin Supreme Court is found at 28 U.S.C.§1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The petitioner, H. Scott Buschman, was injured in an industrial accident on December 3, 1984. In the accident he sustained serious and permanent injuries including the loss of his arm. An action was brought on his behalf by the attorneys, respondents against the manufacturer of the crane he was driving when he was injured. After the case was settled, the petitioner commenced suit against the attorneys, respondents alleging malpractice asserting excessive fees, negligent representation and coercion to settle.

A jury trial on the petitioner's claims was held in Milwaukee, Wisconsin in October, 1992. One of the proposed expert witnesses on behalf of the petitioner was an

African-American. The jury panel presented for participation in the case included four African-Americans. After voir dire the respondents exercised three of their four peremptory challenges against three of the African-American jurors. Appellant immediately o[illegible]cted. The trial judge held a **Batson** hearing and ruled that the peremptory strikes would stand as "race-neutral" on the basis of the reasons advanced by the respondent's attorneys.

Ultimately the jury returned a verdict against the plaintiff/petitioner on all of his claims. The African-American expert witness testified on plaintiff's behalf during the trial.

Appeal was timely taken to the Court of Appeals District I of the State of Wisconsin and that Court by decision of April 5, 1994 decided the jury selection had not been unconstitutional. A-5 to A-7 Appendix.

The Wisconsin Supreme Court denied the timely filed Petition for Review on June 14, 1994. From that decision the petitioner now requests the United States Supreme Court to grant this Petition for Certiorari. Further facts will be presented in the Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

I.

WHERE A PARTY EXERCISES MULTIPLE PEREMPTORY STRIKES AGAINST MINORITY MEMBERS OF THE JURY PANEL A REBUTTABLE PRESUMPTION OF DISCRIMINATORY MOTIVE SHOULD ARISE NOT SATISFIED MERELY BY "RACE NEUTRAL" REASONS ADVANCED BY COUNSEL.

" . . . racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." **Power v. Ohio,** __U.S.__, 111 S.Ct. 1364, 1366, 113 LEd.2d 411 (1991).

It is now clearly recognized that a minority juror may not be stricken by the use of a peremptory challenge in litigation solely on the basis of race without violating the Constitution of the United States. **Batson v. Kentucky,** 476 U.S. 79, 90 L.Ed.2d 69, 109 S.Ct. 1712 (1986); **Hernandez v. New York,** 111 S.Ct. 1859 (1991); **Edmondson v. Leesville Concrete Co.,** 111 S.Ct. 2077 (1991) and **State v. Lopez,** 173 Wis. 2d 724, 496 N.W.2d 617 (Ct. App. 1992).

In announcing the principle, the United States Supreme Court delineated a procedure to be followed which has evolved into an "escape hatch" in practice. The procedure that has evolved is that when there appears to have been a racially based exercise of peremptory challenges and a party objects, the trial court holds what has become known as a **Batson** hearing whereat the allegedly offending counsel is given an opportunity to proffer his "race neutral" explanations for striking the minority juror or jurors. The trial court then determines that the proffered explanations are acceptable to the trial court, denies the motion and the trial proceeds.

The Wisconsin Court of Appeals District I noted in the case at bar the standard of reviewing the trial court's decision in this area is

> "A trial court's finding that a peremtory strike was not race-based will not be disturbed unless clearly erroneous. Section 805.17(2*), STATS.; **Hernandez,** 111 S.Ct. at 1868-1869 (the trial court's decision on the question of discriminatory intent is entitled to 'great deference' on appeal); **Lopez,** 173 Wis.2d at 729, 496 N.W.2d at 619."

As the application of the test to the case at bar demonstrates, the constitutional protection is swallowed in practice by the determination of a trial court that the explanation for the strike is acceptable as "race neutral." In the case at bar there were four black jurors among the jurors assembled

for selection. The respondents exercised their peremptory strikes against three of the four. "The discriminatory exclusion of even one juror violates the mandate of **Batson. Soler v. McHenry,** 771 F.Supp. 252 (N.D. Ill. 1991), 989 F.2d 253 (7th Cir. 1993).

The fact that in the instant case there is an exercise of three peremptory strikes of black jurors should, in an of itself, be compelling presumptive evidence of the discriminatory motive.

> "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . . **Id** at 1868 (quoting **Washington v. Davis,** 426 U.S. 229, 242 (1976)." Quoted by Judge Sundby dissenting in **State v. Davidson,** 166 Wis.2d 35 at pp. 42-43, 479 N.W.2d 185 (1991).

It is only common sense that **multiple strikes** of black jurors should make suspect whether race neutral explanations are really "an obvious mask for a race based challenge." **Splunge v. Clark,** 960 F.2d 705, 709 (7th Cir. 1992). In the case at bar the respondent's attorney advanced the following explanations for the three peremptory challenges he made.

Regarding juror Snipes:

> "MR. SCOTT. I thought Ms. Snipes, and I think court will concur, had a very difficult problem in dealing with fairly straight-forward questions about what her relationship was with her counsel and how the fees were calculated; and I thought that considering that this was going to be a products liability case married to a legal malpractice case, that it would be difficult for her, frankly, to keep up. I, frankly, go for the smartest people I can get on the panel, excuse me."

Transcript Oct. 6, 1992, p. 114, line 8 through line 17.)

Regarding juror Dorsey:

"MR. SCOTT: Well, Rachel Dorsey is currently in a lawsuit in which she is currently unhappy with her attorney. I thought that seemed like an obvious candidate to me. When -- I think the way I put the question to the panel is whether or not anybody has had -- ever had a dispute with their own attorney, and her response was, and it stood out in the crowd, not yet; and it was clear that she was contemplating a claim against her counsel on a case that had not been resolved yet; and I thought since I was defending a person in a legal malpractice case, that that gave me some concern. See, who else did we strike?" Transcript of Oct. 6, 1992, p. 115, line 2 through line 13.)

Regarding juror Wattleton:

"THE COURT: Wattleton, 15.

MR. SCOTT: Right, this is the man who —

MR. SUTTON: New a lot of real good lawyers.

MR. SCOTT: Who knew a lot of real -

MR. SUTTON: Mr. Rothstein and Mr. Eisenberg, and he thought they were really good guys.

MR. SCOTT: That would argue in favor in one sense. I'm trying to find him on the list

here. Oh, there he is. That was a gentleman I think who out of the entire array had the largest number of personal injury claims.''
Transcript of Oct 6, 1992, p. 115, line 14 through line 24.)

MR. SCOTT: We put a sign next to his name during the first go around because we had a positive reaction to him. He's well-spoken. I think he has held jobs of some sophistication. He's a lab tech. But the question there was the number of claims that he had brought, and I was struck by that.''
Transcript of Oct 6, 1992, p. 115, line 7 through line 12.)

With respect to the reasons advanced concerning juror Snipes they were obviously subjective and not supported by the record of Ms. Snipe's responses during voir dire, as follows:

''THE COURT: Mildred Snipes?

JUROR SNIPES: Okay, my job won't allow me two days off, so I will have to notify my job.

Q For whom do you work?

A Froedtert Memorial Hospital.

Q I know from experience that they understand if you're on jury duty that you need to be here. Froedtert understands that. We've -

A Do I have to call them or what?

Q Yes, you have to call them and let them know. But they do not hold you excused from

work, and the law says they can't hold that against you either.

A How many amounts of days I'm supposed to be, I mean the amount of days?

Q Well, I expect that it will be until next week Friday.

A Okay.

Q And if you need a letter, we can provide you a letter.

A Okay."
(Transcript of Oct. 6, 1992, p. 25, line 13 through p. 26, line 5.)

MR. SCOTT: Ms. Snipes, you had a case that went to verdict, am I correct?

JUROR SNIPES: Right.

MR. SCOTT:

Q And that was a case in which you were making a claim?

A Through Dr. Christon when I had surgery on my throat.

Q You were making a claim against him?

A Mm-hmm.

Q And were you represented by counsel, by an attorney?

A Yes.

Q And was it a similar arrangement in the sense that he was going to get a percentage of what you recovered if you recovered?

A No, I was going to get —

Q I'm sorry?

A Now, what did you say?

Q Okay.

THE COURT: She might be thinking of recovery and recovering from the illness rather than the lawsuit.

MR. SCOTT: Could well be.

MR. SCOTT:

Q As I understand, the case you had against the doctor, Ms. Snipes, you were making a claim against him?

A Right.

Q And you were represented by an attorney?

A Right.

Q And he had an attorney?

A Right.

Q And is that a matter that was tried in a court and went to verdict?

A Yes, it was.

Q And was the arrangement with your attorney that he shared in your recovery and he had a percentage claim against what you got if you got anything?

A I really don't know.

Q Do you recall what the fee arrangement — how were you going to pay your attorney in that case?

A I couldn't afford an attorney.

Q Okay. So he was going to only get something if you got something?

A Right.

Q And you didn't get anything, am I right?

A No, I didn't. I lost the case.

Q And so he didn't get anything either?

A No.

Q How long ago was that?

A About ten years ago."
(Transcript of Oct. 6, 1992, p. 101, line 7 through p. 103, line 3.)

The mere fact that Ms. Snipes confused the use of the word "recovery" under the circumstances is hardly demonstrative that she was not one of the "smartest people." A review of the transcript of her responses reflects that Ms. Snipes evidenced a normal if not above normal understanding of the matter to be resolved. In truth, the relative intelligence

of the white jurors was never mentioned. They were automatically qualified as among the "smartest people."

Juror Dorsey was alleged by counsel for the respondents to be "contemplating a claim against her counsel on a case that had not been resolved yet." In fact Ms. Dorsey said no such thing. Her responses to Attorney Scott's questions and Ms. Dorsey's responses were as follows:

> "Q As I understand it, you have a claim pending at the present time, is that right?
>
> A Yes, yes.
>
> Q And is it for a personal injury matter?
>
> A Yes.
>
> Q Is the matter set for trial?
>
> A Not yet.
>
> Q Have you signed a fee contract with your attorney?
>
> A No.
>
> Q Do you understand that he is going to be paid out of the proceeds of your recovery?
>
> A Yes.
>
> Q Okay, and have you and he agreed upon a percentage?
>
> A We haven't got to that point yet, but he did give us like an estimate of what we will get. But I don't want it. I want more.

Q I see. He's told you what he thinks he can recover for you, is that correct?

A Right.

Q And you told him you think you're entitled to more?

A Right.

Q Do you understand that he will get a percentage of the recovery whatever it is?

A Yeah, I understand that.

A You understand that?

A Mm-hmm.

Q You have agreed to that with him?

A No. Well, I understand that he can, that he does get a percentage of it.

Q Do you know what the percentage is?

A No.

Q Who is the attorney?

A Russell Goldstein.

Q Have you complained to Mr. Goldstein that you would like to know a little bit more about your arrangement with him?

A I've tried, but he's never there.

Q So you haven't signed a contract with him, is that correct?

A Right.

Q And if you had a signed contract, you'd understand?

A More about it, yes.

Q And then there is a separate question about whether his estimate of the value of your case is the same as yours?

A Mm-hmm.

Q Is that yes?

A Yes.

Q The reason that I asked you to say yes is because the court reporter —

A Right."
(Transcript of Oct. 6, 1992, p. 76, line 5 through p. 78, line 5.)

She says nothing in the above that could be interpreted that she is **"contemplating a claim against her attorney."** She merely states that she has disagreement with her attorney on the value of her case. She acknowledges that although there is no fee contract that he will receive a percentage of the recovery. The significant point is that the reason advanced by counsel does not square with the jurors actual responses.

With respect to juror Wattleton the same type of inaccuracy was advanced by respondent's attorney. Mr. Wattleton responded to the voir dire as follows:

"MR. SCOTT: Mr. Wattleton, I'm going to ask you about that because you said you knew a lot of good attorneys when you were asked about the Habush commercial. How is it that you know lots of good attorneys?

JUROR WATTLETON: I ran through Mr. Rothstein, Perry Mason things like that, and like Eisenberg, I seen had a really smart thinkers.

MR. SCOTT:

Q So some of the good attorneys you know you know through the media or through fiction?

A Yeah.

Q You've had an occasion, as I recall, to have a number of personal injury claims, am I right?

A Yeah.

Q Did you get what you wanted?

A Yeah.

A In every one of those?

A I was satisfied.

Q You were satisfied. Did you get the first figure in every case?

A I've never seen the first figure.

Q No, when your attorney made a demand, did

you always get that, what he demanded at the first demand, or did you negotiate and compromise towards a resolution?

A No, well, I just called him up and said what's the settlement agreement. We settle.

Q So you pretty much left it up to him; and then when he told you the matter had been settled, you paid him by giving him a percentage of the recovery?

A Yes.

Q Have you ever made a claim against an attorney?

A No.
(Transcript of Oct 6, 1992, p. 73, line 5 through p. 74, line 12.)

MR. SCOTT: Anyone else know someone that works who's lost an arm? Mr. Wattleton?

JUROR WATTLETON: I grew up with a kid a long time ago who lost his hand in a fire. I grew up with him.
(Transcript of Oct. 6, 1992, p. 86, line 24 through p. 87, line 3.)

"MR. SCOTT: Yes, sir, I wanted to make sure. I think it's Wattleton?

JUROR WATTLETON: Yes, track vehicles in the military, recover vehicles when they get stuck we pull them out.

MR. SCOTT:
Q What type of equipment were you using?

MR. SCOTT:
Q What type of equipment were you using?

A Tracks, trucks. Track ambulances."
(Transcript of Oct. 6, 1992, p. 95, line 17 through line 24.)

Mr. Wattleton's obvious, sincere and complete admiration for the attorneys that had represented him and his express satisfaction with the settlements they obtained for him marked him as a juror who would be **most favorable to the respondents.**

It is respectfully submitted that, as a matter of due process and equal protection, a **presumption** should arise from a circumstance where more than one minority juror is excused by peremptory challenge and that presumption should not be overcome by any reasons advanced by counsel that are wholly subjective — such as the reasons advanced in support of the strike against juror Snipes. Objective reasons should be **specifically** supported by the record. The reality is that any lawyer can advance some "race neutral"

explanation for the exercise of strikes.[1] It is respectfully submitted that the Supreme Court should take this opportunity to close the "escape hatch" and end discriminatory exercise of peremptory challenges. A meaningful vital rule should be established.

Any lawyer "worth his salt" can advance a plausible "race neutral reason for striking a minority juror and any trial judge "worth her salt" will most likely accept the rationale of the attorney — as the record in this case most graphically demonstrates. Under the standards of review that obtain reversal is virtually impossible. What exists under the present interpretation of **Edmonson v. Leesville, supra, Hernandez v. New York, supra** and **Batson v. Kentucky, supra** is judicially sanctioned racial discrimination in the selection of juries throughout the United States. This practice should be addressed forthrightly and ended.

CONCLUSION

For the foregoing reasons certiorari should be granted.

Dated at Milwaukee, Wisconsin, this 9th day of September, 1994.

Respectfully submitted,

ROBERT E. SUTTON
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802
Attorney for Petitioner

[1] Over the last three years it has been this writer's experience that in virtually every civil jury trial in which I have been involved the defense has exercised its peremptory strikes primarily against minority members of the jury and **in every instance** been able to advance a "race neutral" explanation for the exercise of the peremptory strikes at the **Batson** hearing . The situation which occured in the case at bar is the rule, not the exception.

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE 608-266-1880

To: June 14, 1994

Hon. William D. Gardner
Milwaukee County Cir. Ct.
901 N. 9th Street, Rm. 404
Milwaukee, WI 53233-1425

Robert D. Schott
Whyte Hirschboeck Dudek
111 E. Wisconsin Avenue, #2100
Milwaukee, WI 53202

Robert E. Sutton
Sutton & Kelly
1409 E. Capitol Dr.
Milwaukee, WI 53211

You are hereby notified that the Court has entered the following order:

No. 93-0925 **Buschman v. Aiken & Mawicke, et al.** L.C. #90CV004630

A petition for review pursuant to sec 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner H. Scott Buschman, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS DECISION
DATED AND RELEASED
April 5, 1994

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to §808.10, Stats., within 30 days hereof, pursuant to Rule 809.62(1), Stats.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-0925

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

H. SCOTT BUSCHMAN,

Plaintiff-Appellant,

v.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. Affirmed.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. H. Scott Buschman appeals from a judgment on a jury verdict finding Merrick R. Domnitz was not negligent in representing Buschman in a product liability suit. Additionally, the trial court determined that the attorneys fees and costs charged by Domnitz were reasonable and properly calculated. Buschman claims that the judgment should be vacated and either entered in his favor, or a new trial granted because he contends that: (1) the trial court's approval of Domnitz's requested fees and costs was

clearly erroneous; (2) he was denied due process of law when Domnitz exercised several peremptory challenges in an allegedly racially discriminatory manner; and (3) the trial court erroneously exercised its discretion in allowing three of Domnitz's witnesses to testify over Buschman's objections. We affirm.

Buschman was injured in an industrial accident and hired Domnitz to represent him. Buschman signed an agreement with Domnitz's law firm acknowledging that the case was to be handled on a contingent-fee basis, but that Buschman was "responsible to pay for disbursements" regardless of the success on the merits of the claim. Domnitz settled Buschman's claim against the manufacturer for $546,480. Of this amount $167,343.31 was earmarked to pay Domnitz's contingent fee, $59,136.59 went to litigation costs, and $120,000 went to reimburse the worker's compensation carrier. Buschman received $200,000 from the settlement, the amount of net recovery for which he authorized settlement. Buschman became unhappy with the settlement, and sued Domnitz, alleging, among other things, that Domnitz's representation had been negligent, and that the contingent fee and costs were excessive. We discuss Buschman's assertions of trial court error in turn.

A. *Contingent Fees and Costs*

Buschmann's first claim is that the trial court's finding that the contingent fee and costs charged by Domnitz were reasonable was clearly erroneous. *See* § 805.17(2), Stats.[1] Buschman makes no claim that the amount of litigation costs claimed were not actually incurred in prosecuting his claim or that a contingent fee of just over 30% should not be

---

[1] Buschman has abandoned his earlier challenge to the trial court's reserving the reasonableness-of-fees issue to itself. Buschman asserts that the proper standard of review on this issue is whether the trial court's determination was "against the great weight and clear preponderance of the evidence." This standard is the equivalent of the "clearly erroneous" standard found in § 805.17(2), Stats. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

allowed. Rather, he claims that Domnitz's way of calculating the fee and expenses was contrary to law. Buschman claims that Domnitz should have first deducted the $59,136.59 in litigation costs and the $120,000 earmarked for the worker's compensation insurer from the $546,480 before he calculated his contingent fee. Section 102.29(1), Stats., authorizes Domnitz's division of the award. Section 102.29(1) provides:

> *After deducting the reasonable cost of collection,* one-third of the remainder [recovered from any third-party in a tort-action] shall in any event be paid to the injured employe [sic] . . . Out of the balance remaining, the employer, [or] insurance carrier . . . shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under [the worker's compensation] chapter . . . Any balance remaining shall be paid to the employe [sic] . . .

(Emphasis added.) The "costs of collection," which include attorney fees, are to be deducted from the entire award *before* the award is divided. Buschman does not develop any argument, beyond his mere assertion, why this statutorily-authorized method of allocating the settlement gave Domnitz an unreasonable fee, or that the costs were unreasonable. ***See Brewer v. Auto-Owners Ins. Co.,*** 142 Wis.2d 864, 868,418 N.W.2d 841, 843 (Ct. App. 1987) ("Unless all parties consent to a division different from that in sec. 102.29(1), the statute controls."); ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-143 (Ct. App. 1987) (a reviewing court will not consider undeveloped arguments). The trial court's finding that Domnitz's fee and other costs were reasonable was not clearly erroneous.[2]

[2] Buschman also argues that the contingency fee agreement was deficient because it did not state whether costs were to be deducted before or after the contingent fee was calculated, in violation of SCR 20:1,5. That rule, however, was not in effect at the time the agreement was made. Further, violation of the rule does not effect the fee's reasonableness or its proper calculation.

B. *Alleged Misuse of Peremptory Challenges*

Buschman's second challenge to the judgment is his contention that he was denied due process when Domnitz allegedly used three peremptory challenges in a racially discriminatory manner. A party claiming purposeful discriminatory use of a peremptory challenge must show the following:

> First, the [challenging party] must make a prima facie showing that the [other party] has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the [other party] to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the [challenging party] has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (citations omitted); ***State v. Lopez,*** 173 Wis.2d 724, 728, 730, 496 N.W.2d 617, 618-619 (Ct. App. 1992). ***Hernandez*** applies to civil cases. ***Edmonson v. Leesville Concrete Co.,*** 111 S. Ct. 2077 (1991). A trial court's finding that a peremptory strike was not race-based will not be disturbed unless clearly erroneous. Section 805.17(2), Stats.; ***Hernandez,*** 111 S. Ct. 1868-1869 (the trial court's decision on the question of discriminatory intent is entitled to "great deference" on appeal); ***Lopez,*** 173 Wis.2d at 729, 496 N.W.2d at 619.

In the present case, Domnitz used his peremptory challenges to strike three of the four black persons in the jury pool. Buschman complained that these strikes were racially motivated, and the trial court conducted a hearing in chambers, on the record. Domnitz gave the following reasons for his choices: (1) one juror had a "very difficult problem in dealing with fairly straight-forward questions about what her relationship was with her counsel and

how the fees were calculated . . . considering that this was going to be a products liability case married to a legal malpractice case, that it would be difficult for her, frankly, to keep up''; (2) a second juror was currently in litigation and was unhappy with her attorney, and her responses indicated that she was considering filing a claim against her attorney; and (3) the third juror had the largest number of personal-injury claims of any member of the panel. The trial court found that the peremptory strikes were ''reasonably based on the observations of the panel'' and ''not race based.'' This finding is not clearly erroneous.

C. *Alleged Error in Allowing Witnesses' Testimony*

Buschman's final claim is that the trial court erred in allowing three expert witnesses to testify for Domnitz even though Buschman claims he never had the opportunity to depose them. Admission of testimony is within the discretion of the trial court, ***Lievrouw v. Roth,*** 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990), and the exercise of discretion will not be disturbed if the trial court examined the relevant facts, applied the proper standard of law and used a demonstrative rational process in reaching a conclusion that a reasonable trial court could reach. ***Loy v. Bunderson,*** 107 Wis.2d 400, 414-415, 320 N.W.2d 175, 184 (1982).

During the seventh day of the trial, Buschman objected to John Frank, Robert Habush, and Alan Gesler testifying for Domnitz, claiming that he had not been given an opportunity to depose them and did not know that Frank would be a witness until the trial began. After a hearing, the trial court concluded that Buschman had the duty to initiate the taking of the depositions and his failure to do so was not a reason to prevent the witness from testifying.

The trial court did not misuse its discretion. Domnitz timely complied with a scheduling order and identified Frank, Habush and Gesler as witnesses. Although Buschman

claims that later correspondence with Domnitz led Buschman to believe that Frank would no longer be a witness, Buschman was aware that Frank was a potential witness. Further, the trial court found Buschman was well aware of the "content of Frank's anticipated testimony, both plaintiff's counsel and plaintiff's engineering expert being in possession of Frank's deposition from the underlying case." Accordingly, the trial court determined that Buschman was not unfairly prejudiced by Frank's testimony. The record amply supports these findings; they are not clearly erroneous.

Originally, Buschman sought to depose Habush and Gesler, but was told that they would not be available until Domnitz finished deposing Buschman's experts. When this was done, however, Buschman did not try to depose Habush or Gesler, nor did he submit to them written interrogatories, even though he did contact Domnitz to schedule depositions for another witness. Buschman did not again attempt to depose Habush, Gesler, or Frank before they testified at trial. According to an affidavit submitted to the trial court in opposition to Buschman's motions after verdict, Buschman's counsel told an attorney for Domnitz that Buschman had a strategic reason for not deposing the witnesses—he did not want the depositions to prepare the witnesses for cross-examination. The trial court acted within its discretion when it allowed Habush, Gesler, and Frank to testify.

By the court.—Judgment affirmed.[3]

This opinion will not be published, *See* RULE 809.23(1)(b)5, STATS.

---

[3] We censure counsel for Buschman, Robert E. Sutton, for the false charge contained in his brief that Domnitz committed "perjury" during his deposition. The charge is based on Domnitz's deposition testimony that settlement negotiations "in earnest" had not begun until "[l]ate spring of 1988," even though Chicago counsel in the underlying product-liability had sent a letter in December of 1987 offering a structured settlement.

We have reviewed the transcript excerpts quoted by Sutton; they do not even come close to supporting his charge of perjury. The focus of Domnitz's answer was whether the settlement negotiations were "in earnest." Indeed, that was the question Sutton ultimately asked. Whether the December, 1987, letter reflected settlement negotiations "in earnest" is a matter of interpretation. Sutton has not demonstrated that Domnitz's response was not true. If Sutton wanted Domnitz to discuss *all* communications relating to a possible settlement of the underlying action, Sutton should have so asked. *Cf.* ***Bronston v. United States,*** 409 U.S. 352, 358-359 (1973) (responsibility of lawyer to ask the right question).

Supreme Court, U.S.
FILED
OCT 4 1994
OFFICE OF THE CLERK

No. 94-432

In The

Supreme Court of the United States

October Term, 1994

H. SCOTT BUSCHMAN,

Petitioner,

v.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF AIKEN & MAWICKE, S.C. AND MERRICK R. DOMNITZ

ROBERT D. SCOTT*
MARY C. FLANNER-STRACK
WHYTE HIRSCHBOECK DUDEK, S.C.
Suite 2100
111 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 273-2100
Attorneys for Respondents Aiken & Mawicke, S.C. and Merrick R. Domnitz

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court should overrule its recent decisions allowing parties to use subjective judgment on racially-neutral issues when exercising peremptory challenges.

PARTIES IN THIS PROCEEDING

The respondents filing this brief are Aiken & Mawicke, S.C. and Merrick R. Domnitz. Aiken & Mawicke, S.C. is a service corporation without any parent corporations or subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES IN THIS PROCEEDING ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

1. Trial lawyers may exercise peremptory strikes on the basis of their subjective judgment without offending the Equal Protection Clause 5

2. The peremptory strikes of the three black jurors at issue in this petition were based on race-neutral reasons verifiable in the record 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES:

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 5, 6, 9, 13

Edmonson v. Leesville Concrete Company, 500 U.S. 614 (1991) 6

Georgia v. McCollum, 113 S. Ct. 1271 (1993) 6

Hernandez v. New York, 500 U.S. 352 (1991) 6, 7, 12

J.E.B. v. Alabama, 114 S. Ct. 1419 (1994) 6, 8

Powers v. Ohio, 499 U.S. 400 (1991) 6

Swain v. Alabama, 380 U.S. 202 (1965) 8

UNITED STATES CONSTITUTION:

Fourteenth Amendment to the United States Constitution 1

STATUTES:

28 U.S.C. § 1257 1

No. 94-432

In The

Supreme Court of the United States

October Term, 1994

H. SCOTT BUSCHMAN,

Petitioner,

v.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF AIKEN & MAWICKE, S.C. AND MERRICK R. DOMNITZ

JURISDICTION

Jurisdiction for this petition is found in 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part that

No State shall . . . deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, H. Scott Buschman, lost an arm when the crane he was operating tipped over in an industrial accident in December, 1984. He initiated a products liability lawsuit against the crane manufacturer and settled that action for $546,480. At the time of the settlement, he was represented by the respondents Aiken & Mawicke, S.C. and Merrick R. Domnitz.

Nearly two years after the settlement, the petitioner commenced a legal malpractice lawsuit against the respondents. He alleged that he had been coerced into accepting the settlement and that the respondents were guilty of other acts of malpractice.

Judge William D. Gardner of the Milwaukee County Circuit Court presided over the jury trial of this malpractice action. After attorneys for both sides had exercised their peremptory strikes, petitioner's counsel asked for the opportunity to make an objection out of the hearing of the jury. Whereupon proceedings took place in Judge Gardner's chambers following the three step process outlined in *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). *See* (R.98: 109-116).

First, petitioner's attorney attempted to make a prima facie showing that defense counsel had exercised peremptory challenges on the basis of race. Specifically, it was asserted that there were four black persons on the jury and one Latino and that defense counsel had used

three of his four peremptory strikes to remove black jurors from the panel. Thereupon the trial court invited the defense counsel to explain why his peremptory strikes were used against black venirepersons.

Respondents' counsel described his reasons on the record for each of the three strikes against black venirepersons. (*Id.* at 114-116). As to one venireperson (Snipes), respondents' counsel observed that she "had a very difficult problem in dealing with fairly straightforward questions about what her relationship was with her counsel and how the fees were calculated; and I thought that considering this was going to be a products liability case married to a legal malpractice case, that it would be difficult for her, frankly, to keep up." Judge Gardner stated on the record that his own observations of this juror were consistent with those of respondents' counsel. (*Id.* at 114).

Respondents' counsel then stated that the voir dire had disclosed that a second black venireperson (Dorsey) was currently in a lawsuit in which she was unhappy with her attorney. Defense counsel had inquired of the entire panel whether anyone had ever had a dispute with their own attorney and it was clear from this venireperson's response that she was contemplating a claim against her counsel in a case that had not yet been resolved. Because the petitioner's lawsuit was a legal malpractice action, respondents' counsel felt that a person who was already contemplating an action against her own attorney was a clear candidate for a peremptory strike. (*Id.* at 115).

Finally, respondents' counsel told the court that his third peremptory strike of a black person was based on information developed during voir dire that this venireperson (Wattleton) had made the largest number of personal injury claims of any member of the panel. Petitioner's counsel confirmed on the record that this was an accurate count. Again, in light of the fact that the petitioner was pursuing a personal injury claim in the underlying products liability lawsuit, it was felt that this venireperson was a candidate for a peremptory strike. (*Id.* at 115-116).

Thereupon Judge Gardner concluded that the peremptory strikes "are not race based." (*Id.* at 116). This conclusion was based on Judge Gardner's: "own personal observations that the reasons provided by (respondents' counsel) for the exercise of his peremptories are reasonably based on the observations of the panel . . . " (*Id.* at 116).

The trial proceeded to a verdict exonerating the respondents and the petitioners appealed to the Wisconsin Court of Appeals. That Court issued its decision on April 5, 1994 deciding, inter alia, that the trial court's decision regarding the peremptory strikes was not clearly erroneous. The Wisconsin Supreme Court denied a petition for review on June 14, 1994 and the petitioner now requests the United States Supreme Court grant certiorari.

REASONS FOR DENYING THE PETITION

1. Trial lawyers may exercise peremptory strikes on the basis of their subjective judgment without offending the Equal Protection Clause.

The petitioner has not attempted to present the type of issue that normally serves to invoke a review on writ of certiorari under Rule 10. There is no suggestion that the decision of the Wisconsin Court of Appeals conflicts with any decision of this Court. Rather, the petitioner argues that the procedures this Court crafted in *Batson v. Kentucky*, 476 U.S. 79 (1986) and subsequent cases are inadequate to eliminate racial discrimination in the use of peremptory strikes, particularly insofar as strikes are based on "subjective" reasons.

This latter issue is different from the petitioner's expression of the "Question Presented" section of his brief. There he asks whether a presumption of racial discrimination should arise when more than one minority member of the venire is stricken. However, that issue was actually mooted below when the trial judge required the respondents to express the reasons for their strikes.

This Court should deny certiorari because it has endorsed reliance on subjective reasons in the exercise of peremptory strikes and because the record below demonstrates that the respondents had racially neutral reasons for their strikes.

In *Batson*, this Court held that the Equal Protection Clause in the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. In a series of cases since *Batson*, the Court has

confirmed that, whether the trial is civil or criminal, prospective jurors and litigants have an equal protection right to jury selection procedures that are free of both racial and gender-based prejudice. *See Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 113 S. Ct. 1271 (1993); *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994).

The procedures and standards by which this promise is made reality have been defined by *Batson* and the cases that followed. First, the aggrieved litigant must make a prima facie showing that the opposition exercised its peremptory challenge(s) on the basis of race or gender. *Batson*, 476 U.S. at 96-97. If the requisite showing has been made, the burden shifts to the party exercising the strike to articulate a race or gender neutral explanation for striking the juror(s) in question. *Id.* at 97-98. Finally, the trial court must determine whether the aggrieved party has met its burden in proving purposeful discrimination. *Id.* at 98.

It is clear that the trial attorneys may rely on more than the jurors' verbal responses during voir dire. This Court has sustained strikes based on a variety of signals derived from body language and interpreted by counsel according to his/her "seat-of-the-pants" ideas about what these signals mean. In *Hernandez v. New York*, 500 U.S. 352 (1991) this Court dealt with just such judgments in a state criminal proceeding. The defense counsel objected that the prosecutor had used its peremptory challenges to exclude four potential jurors who were Latino. After it was determined that two of the jurors had been stricken for clearly valid reasons, the focus turned to the two jurors which the prosecutor had stricken because he

believed: "[T]here was a great deal of uncertainty as to whether [these jurors] could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses. . . . " *Id.* at 356. The prosecutor explained that he doubted their commitment to accept the interpreter's translation when, after asking if they would accept the translation: "They each looked away from me and said with some hesitancy that they would try. . . . " *Id.*

The trial court accepted these reasons and denied the motion for mistrial. The New York Supreme Court, Appellate Division, and the New York Court of Appeals affirmed, each holding that the prosecutor had offered a legitimate basis for the challenges in question and deferring to the factual findings of the trial court.

This Court granted certiorari and, in accordance with *Batson*, afforded great deference to the trial court's decision that the prosecutor had exercised his peremptory strikes without an impermissible discriminatory intent, a finding to be sustained, absent a showing that it was "clearly erroneous." *Id.* at 369.

It is clear in *Hernandez* that the prosecutor relied on his own subjective interpretation of the jurors' nonverbal behavior when responding to his questioning. Specifically, he relied on his observations that they had looked away from him and answered with "some hesitancy" when he questioned them about their willingness to accept the translation of the court interpreter.

These are observations that are probably not verifiable from the transcript of the voir dire and they led to

judgments by the prosecutor that might be called "subjective." One could say that the prosecutor was acting on a "hunch" derived from a juror's "bare looks and gestures." *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (citing *Swain v. Alabama*, 380 U.S. 202, 220 (1965)). The exercise of the prosecutor's "subjective" judgment divided the potential jurors into two classes on either side on an important, racially-neutral issue: whether the jurors would accept the translation of the court interpreter. This Court recognized in *Hernandez* that, while such a judgment might create categories that included both Latinos and non-Latinos, it might also result in a disproportionate removal of the prospective Latino jurors. *Hernandez*, 500 U.S. at 361. Nevertheless, a racially disproportionate impact, standing alone, does not violate the Equal Protection Clause as a matter of law. *Id.*

The jury strikes at issue on this petition follow the same pattern reflected in *Hernandez*. Respondents' counsel had his personal, subjective reasons for striking each of the three jurors and those reasons were all racially neutral. A distinguishing feature of this case is that the reasons for striking each of the jurors are verifiable on the record.

2. The peremptory strikes of the three black jurors at issue in this petition were based on race-neutral reasons verifiable in the record.

Each of the three strikes was made for a different reason: juror Snipes because she appeared to have difficulty understanding and responding to the voir dire; juror Dorsey because she was in a lawsuit in which she

was unhappy with her attorney and contemplating a claim against him; and, juror Wattleton because he had made the largest number of personal injury claims of anyone on the panel.

The petitioner does not claim that any of these reasons is race-based. Instead, he argues that the record does not support the reasons given for striking jurors Snipes and Dorsey and that this Court should close an "escape hatch" that allows trial lawyers to justify their peremptory strikes with subjective reasons. In the latter regard, the petitioner asks the Court to establish a new rule requiring objective reasons "specifically supported by the record" to justify any peremptory strike of a minority where more than one such juror is stricken.

The record in this case discloses that each of the strikes is "specifically supported by the record." Unfortunately, it is the burden of the respondents to clarify the record and, in one instance, to correct a misstatement of the record made by the petitioner repeatedly in the appellate process of this case.[1]

First, respondents must clarify the record because petitioner omitted the trial judge's observation of juror Snipes. The respondents told Judge Gardner during the *Batson* hearing that they had stricken juror Snipes because she had difficulty dealing with the questioning during voir dire. The petitioner asserts that those reasons were

---

[1] Petitioner's treatment of the record in his briefing before the appellate courts of Wisconsin has already drawn censure of his counsel. The Wisconsin Court of Appeals censured Attorney Sutton for a "false charge" in his brief before that court. *Pet. App. p. 8.*

not supported by the record of Ms. Snipe's responses on voir dire and then recites a portion of that voir dire (Petitioner's brief pp. 7-10.) However, petitioner fails to inform this Court that the record contains Judge Gardner's statement that his own observations were consistent with those of the respondents' counsel. (R.98: 114).

Next, respondents must correct a misstatement of the record regarding juror Dorsey. This again involves petitioner's omission of a critical exchange. Respondents' counsel told Judge Gardner during the *Batson* hearing that he had stricken juror Dorsey because voir dire had disclosed that she was contemplating a claim against her counsel on a case that had not been resolved yet. Petitioner informs this Court in his brief that: "In fact Ms. Dorsey said no such thing." Petitioner then recites portions of Ms. Dorsey's responses on voir dire. (Petitioner's brief pp. 11-13). Then petitioner again asserts that there is nothing in it that can be interpreted to mean that juror Dorsey was "contemplating a claim against her attorney." (Petitioner's brief p. 13).

For the second time in the appellate process of this case the petitioner has made a conscious, intentional misrepresentation of the record to the Court when reciting part of the exchange involving juror Dorsey. The petitioner has omitted an exchange that occurred during the voir dire of the entire panel by the respondents' counsel when the group was asked whether anyone had made a complaint against a lawyer.

> Mr. Scott: Has anyone made a claim against an attorney that is on this panel? Has anyone ever had a dispute with their

attorney over their fees? (R.98: 74; lines 13-15).

Following that question, respondents' counsel had an exchange with another juror. After that exchange was completed, the following question was again put to the entire panel:

Mr. Scott: Thank you. Anybody else have a complaint with an attorney?

Juror Dorsey: I will be if I don't get anymore money. (R.98: 75-76).

In the exchange that followed, Ms. Dorsey stated that she was unhappy with her attorney and she had told him she thought she was entitled to more money than he thought he could recover for her.

The petitioner made the same misrepresentation of the record in the Petition for Review submitted to the Wisconsin Supreme Court. (Petitioner's brief p. 11). The respondent was obliged to make the same correction in its response opposing the Petition for Review. (Respondents' brief p. 6).

The racially-neutral reasons for respondents strikes are fully supported by the record. While it is true that respondents' counsel made a "subjective" judgment about juror Snipes, it was a judgment about a race-neutral issue: her ability as a juror to understand and weigh testimony in a particularly difficult case. The trial would involve a "case within a case" in which jurors would hear testimony on both the products liability issues relating to the design of the crane and malpractice issues relating to

the conduct of the respondents. There would be conflicting expert testimony by both engineering and legal experts on issues that would be submitted to the jury.

The difficulty juror Snipes had with the voir dire was observable by both respondents' counsel and by the presiding trial judge. After the respondents had explained their strike of juror Snipes, the trial court commented on the record:

> THE COURT: I tried to help, in fact, in your voir dire Ms. Snipes by suggesting that she was misunderstanding what you meant by recovery. But I made observations consistent with what you said. (R.98: 114).

Hence, the strike of juror Snipes was "specifically supported by the record." When this Court has already confirmed that trial attorneys may use their "subjective" judgment to reach race-neutral reasons for exercising peremptory strikes, there would seem to be little room left for dispute when the trial judge confirms that he made the same observations and came to the same conclusions as respondents' counsel.

With jurors Dorsey and Wattleton, respondents' counsel again made the type of subjective judgments endorsed by this Court in *Hernandez*. Because he was defending a legal malpractice claim in which his client was alleged to have coerced the petitioner into accepting an allegedly inadequate settlement, respondents' counsel concluded that juror Dorsey (who was already upset with her attorney for suggesting a modest settlement of her personal injury claim) and juror Wattleton (who had made the largest number of personal injury claims of any

member of the panel) would be more sympathetic with the petitioner (a malpractice plaintiff) than with the defendant attorney accused of malpractice. Again, the judgments were made upon reasons that were "specifically supported by the record."

The transcript of the *Batson* hearing conducted by circuit judge William Gardner in this case reflects that the challenges to the jury strikes were handled fully and with dispatch. The three step process was followed and, after having heard all he needed from both attorneys, Judge Gardner made his findings that the reasons given by the respondents' counsel were "reasonably based on the observations of the panel . . . " and that they: "are not race based." (R.98: 116).

In summary, this case contains a record of how well a trial judge on the spot can deal with the *Batson* issues. There is nothing here that needs fixing.

CONCLUSION

The Court should dismiss the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT D. SCOTT*
MARY C. FLANNER-STRACK
WHYTE HIRSCHBOECK DUDEK S.C.
Suite 2100
111 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 273-2100
Attorneys for Respondents
Aiken & Mawicke, S.C. and
Merrick R. Domnitz

*Counsel of Record